Supreme Court, U.S.
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No. 05-1655

IN THE

Supreme Court of the United States

KMART CORPORATION,

Petitioner,

v.

STEARNS COUNTY, MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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I. SUMMARY

This case arises from the Minnesota Tax Court's routine application of a clear state statute, in a manner entirely consistent with existing Minnesota Supreme Court precedent. KMART's petition - seeking no more than a review of the Minnesota Supreme Court's interpretation of a state civil statute, and the Tax Court's application of that statute to particular facts - presents no substantial federal question. Minnesota affords taxpayers a plain and simple remedy to obtain a refund of any tax found to be excessive. Our state's tax court provides taxpayers a panoply of procedural safeguards and painstakingly seeks to apply its own precedent, subject to the overriding authority of the state Supreme Court. KMART's problem derives from its own failure to follow clear and simple statutory rules governing property tax proceedings.

Minnesota Statutes Section 278.05 subdivision 6(a) requires a property tax appellant to provide income and expense figures to the county assessor within 60 days after filing a petition for judicial review of a property tax assessment against income-producing property, but provides an exception for information that is unavailable to the taxpayer. The statute is commonly referred to in Minnesota property tax circles as the "60-day rule." Failure to provide available information results in dismissal of the petition, and that has resulted in several attempts by non-compliant taxpayers to narrow enforcement of the 60-day rule in some way. However, the Minnesota Supreme Court has repeatedly enforced this statute according to its terms. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997); Mendota Mall Associates v. County of Dakota, 578 N.W.2d 350

(Minn. 1998); KMART v. County of Becker, 639 N.W.2d 856 (Minn. 2002); KMART v. County of Douglas, 639 N.W.2d 863 (Minn. 2002).

In 2001, KMART concurrently filed 54 property tax petitions for commercial properties in counties throughout the State of Minnesota. One of these 54 petitions was filed to challenge Stearns County's assessment against KMART commercial property in Stearns County. Another of these 54 petitions was filed to challenge Anoka County's assessment against KMART commercial property in Anoka County.

Although the Stearns County KMART had considerable expense information in its possession, KMART elected to provide no expense information at all to the Stearns County Assessor. Stearns County moved for dismissal of the 2001 and later petitions pursuant to the 60-day rule. KMART then filed bankruptcy, and at KMART's request, the Tax Court stayed all proceedings until bankruptcy proceedings were complete. Once the stay was lifted, Stearns County renewed its motion to dismiss. In response, KMART admitted that the disclosure statute clearly required disclosure of any relevant information in its possession, but claimed that it was excused from supplying expense information because it had no relevant information available.

The Anoka County and Stearns County appeals moved through the Tax courts separately, before different judges, both delayed by the bankruptcy proceedings. In both cases, the County moved for dismissal based upon non-production of property-related information, but Stearns County submitted a significantly different factual record to the Tax Court than Anoka County did. In each case.

KMART opposed dismissal with a conclusory affidavit asserting that there was no relevant expense related information for the local commercial property. But Stearns County rebutted that affidavit by proving specifically that KMART did maintain extensive real estate related expense information. Also, Stearns County provided detailed unrebutted expert testimony showing that the withheld information was directly related to property valuation. Based on this record, the Tax Court agreed that Stearns County KMART withheld readily available relevant information and dismissed KMART's Stearns County petition.

Stripped to its essentials, KMART's contention here is that because the Tax Court judge hearing KMART's Anoka County tax petition found that the Anoka KMART lacked relevant property expense information for the Anoka facility, it followed as a matter of constitutional law that a different Tax Court judge adjudicating KMART's Stearns County petition was bound to determine that the Stearns County KMART had no relevant expense information for the Stearns County store either. But as the Tax Court found, the evidence in the two cases on unavailability was simply not the same. This case is not about stare decisis at all, it is about two judges weighing different evidence in different cases and making judgments appropriate to the evidence they heard in each case.

KMART's petition does not raise a substantial federal question. There is nothing shocking or unusual about the Minnesota Supreme Court's decision. The statute in question plainly requires disclosure of expense information. No decision of the Minnesota Supreme Court offered reason to KMART to withhold expense related information. KMART

was not surprised or ambushed: in fact, KMART itself acknowledged to the Tax Court that the statute clearly requires disclosure of relevant expense information, unless it is unavailable. KMART Opposition to Stearns County Motion to Dismiss, page 10.

KMART relies on a series of void-for-vagueness decisions in this court holding that criminal statutes--especially those implicating constitutionally protected conduct--must be sufficiently precise to place a citizen on notice of what conduct is prohibited. The Minnesota disclosure statute would pass muster under that standard, even if it were a penal statute.

KMART also relies upon a series of cases, such as McKesson and Reich v. Collins, each of which involved the obligation of states to provide their taxpayers with a meaningful procedure to obtain a refund of a state tax imposed in violation of the United States Constitution or federal privileges and immunities. This Court has held that a State Supreme Court cannot retroactively obliterate a time-honored state remedy in order to withdraw from the taxpayer the ability to collect a refund of a tax imposed in violation of the United States Constitution or other federally conferred rights. The Minnesota Supreme Court's decision does not offend that standard.

This Court's decision in Brinkerhoff-Faris Trust & Savings Co. v. Hill clearly explains that a taxpayer "assume[s] the risk that the ultimate interpretation by the highest court might differ from his own." That warning is singularly appropriate here, because by 2001, when KMART filed its Stearns County tax petition, the Minnesota Supreme

Court had already clearly held that the 60-day rule would be enforced according to its literal terms. The Minnesota Supreme Court's decision here is entirely consistent with its former precedent and simply enforces the plain language of the applicable statute.

This Court has never suggested that an inferior court's decision has stare decisis effect in a state supreme court nor has it suggested that the United States Supreme Court supervises state supreme courts in deciding what weight to afford to the decisions of inferior state courts. KMART is attempting to use the United States Constitution to foist upon the Minnesota Supreme Court and legislature a patently absurd construction of the Minnesota statute in question.

II. STATEMENT OF THE CASE

Petitioner KMART rents a build-to-suit commercial center in Waite Park Minnesota from Continental Properties under a net lease which shifts virtually all facility expenses to tenant KMART. KMART directly pays common area costs, building casualty and liability insurance, routine maintenance costs, parking lot maintenance and utilities under its lease obligation[1]. KMART maintained facility-

[1] The KMART-Continental Properties Lease authorizes KMART to file a tax-court petition and requires Continental Properties to provide KMART with any information it needs to perfect its appeal. KMART made no effort to ask Continental Properties to assist by providing the information that Continental Properties possessed.

specific monthly and annual financial statements which identify these real estate related expenses for the Waite Park property as part of its regularly kept business records.

Under Minnesota Law, a property taxpayer must supply facility operating expense information to the County assessor within 60 days of perfecting a tax appeal on leasehold property. Failure to do so results in dismissal of the appeal. KMART filed a petition challenging its property tax, but failed to supply any of the facility operating expense information maintained by KMART within 60 days as required by the statute. Accordingly, Stearns County moved to dismiss the petition.

In response to the motion to dismiss, KMART admitted that KMART knew that it was required to supply expense-related information. In fact, KMART specifically acknowledged that the 60-day rule "clearly require[s] the petitioner to provide *any* of the required information *within its possession on the date of the deadline.*" KMART Opposition to Motion page 4 (emphasis in original).[2] KMART defended the motion to dismiss not on vagueness grounds, but upon the grounds that the relevant information was not available.

In support of its unavailability defense, KMART

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[2] Indeed, KMART's current attorney himself testified to the legislature that while unsophisticated small taxpayers might be unaware of the requirement at all, that those taxpayers familiar with tax law, a category into which KMART clearly falls, would have no trouble complying. MN House Tax Committee Hearing: 3/25/94 PM, R. App. 4.

provided a cursory conclusory affidavit asserting that KMART had no information on facility operating expenses in its possession. KMART captioned its written argument to the Tax Court: "The 60-day Rule Does Not Require Kmart to Produce Unavailable Information." KMART told the Tax Court that in order to obtain dismissal, "Stearns County would have to disprove KMART's showing that records of the real estate operation were unavailable to it." Id., page 10. In its dismissal decision, the Tax Court applied the law exactly as articulated by KMART in its opposition to the motion and found that Stearns County had disproved "that records of the real estate operation were unavailable to it." The Court found that KMART's conclusory affidavit was demonstrably false and that KMART clearly had this information in its possession.

KMART then moved the Tax Court to reconsider its decision. KMART argued that other Tax Court judges had found affidavits similar to that filed by KMART to be persuasive evidence on the unavailability issue. KMART argued that the doctrine of stare decisis should lead the Tax Court to accept its conclusory affidavit as factually correct just like other judges had done in previous cases. KMART also argued that prior Tax Court decisions should be read to hold that real estate expenses need never be produced, because they were not relevant to the appraisal of real estate. The key decision upon which KMART relied dealt with an Anoka County KMART rendered in 2004, nearly three years after Stearns County first moved to dismiss KMART's petition.

In a careful opinion, the Tax Court rejected KMART's arguments. Petitioner's App. 54. The fact that

some other tenant proved that expense information was not available in its case did not govern the factual dispute over unavailability in this case. Here, Stearns County had provided overwhelming proof that the expense information was actually in KMART's possession. Real estate related expenses were reported in KMART's financial statements for the Stearns County facility, and Stearns County had provided unrebutted evidence that these expenses were plainly related to the appraisal process.

The Tax Court carefully dissected prior precedent and rejected KMART's contention that previous decisions had held that expense related information did not need to be provided. The plain language of the Statute required production of both income and expense information. The controlling decisions by the Minnesota Supreme Court had specifically ruled that this statute plainly requires the taxpayer to supply the county assessor all income **and expense** figures to which the tax petitioner has access. BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). Cf Mendota Mall Associates v. County of Dakota, 578 N.W.2d 350 (Minn. 1998); KMART v. County of Becker, 639 N.W.2d 856 (Minn. 2002); KMART v. County of Douglas, 639 N.W.2d 863 (Minn. 2002). There was no hint in Supreme Court precedent that taxpayers could ignore the expense production requirement with impunity. Prior Tax Court cases merely held that taxpayers need not produce business operating expenses, such as personnel costs, because these expense have no bearing on property evaluation. The expenses involved here were directly related to the real estate: adoption of KMART's interpretation of the statute would eviscerate the plain meaning of the statute.

In its appeal to the Minnesota Supreme Court[3], KMART argued that the Tax Court's factual finding that KMART's data was available represented groundbreaking legal precedent and that the factual finding should be applied only prospectively under Chevron Oil Company v. Huson, 404 U.S. 97 (1971).[4] KMART also relied upon dicta in the 2004 Anoka County Tax Court decision (App. 8) and argued that these decisions should somehow trump the Supreme Court's own precedent and the Tax Court's decision in KMART v. Stearns County. The Minnesota Supreme Court rejected KMART's appeal and held that is decisions "uniformly support a broad reading of the [disclosure] rule." The Court continued: "Consistent with our past decisions, we interpret the 60-day rule to require production of expense information that is useful and relevant to the appraisal process."

The Minnesota Supreme Court also rejected KMART's argument that the Supreme Court must follow erroneous inferior decisions of the Tax Court:

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[3] The Minnesota Supreme Court reviews Tax Court decisions by direct writ of certiorari, bypassing the Minnesota Court of Appeals. Unlike other civil cases, Tax Court decisions are reviewed as of right.

[4] KMART does not site Chevron in its petition here, because Chevron simply does not involve a case where this Court failed to apply the benefit of its decision to the prevailing party. Chevron actually made the decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) prospective as other parties who had not participated in this Court's Rodrigue decision.

> where the tax court incorrectly interprets a statute in one case, that interpretation does not override the statute in future cases. And, of course, decisions of the tax court have no binding effect on this court when we are ultimately called on to interpret a statute. Petitioner's App. 17 (citation omitted). 710 N.W.2d 761, 770.

The Supreme Court's decision then explained why the Tax Court decisions relied upon by KMART did not require prospective application. First, the Court found, these decisions simply did not stand for the proposition argued by KMART. No Tax Court decision had squarely held that relevant expense information need not be produced. Second, if the Tax Court had held that expense information need never be produced, that would constitute a plainly erroneous interpretation of clear statutory authority. Third, the Tax Court is an inferior tribunal; its decisions simply do not bind the Minnesota Supreme Court.

III. REASONS FOR DENYING THE PETITION

A. The Minnesota Tax Court's Decision Turned on a Factual Dispute.

In later sections we deal with KMART's claims that Minnesota's civil tax statute is subject to a void for vagueness challenge in this Court as well as KMART's claim that the Minnesota Supreme Court violated due process by failing to follow a legal interpretation rendered by an inferior tax court.

Each of those claims wrongly assumes that the Tax Court's decision in the Stearns County KMART rests entirely upon a reversal of lower-court legal precedent. On the contrary, the primary issue presented to the Tax Court by Stearns County's motion to dismiss was factual: should KMART be excused because relevant expense information was unavailable to KMART? This devolved into the factual question whether the Tax Court should believe KMART's employee's faulty generic affidavit in the face of overwhelming evidence to the contrary.

While KMART styles this as a legal dispute now, in the Tax Court this was submitted as a simple factual dispute. KMART there specifically told the Tax Court that the statutory requirement was not vague at all. It argued instead:

> The Minnesota Supreme Court has provided a common sense definition of the statutory term "unavailability" by paraphrasing the requirements of that Statute as "clearly requiring the petitioner to provide *any* of the required information *within its possession on the date of the deadline.*" A taxpayer cannot, however, be required to produce information not within its possession. The undisputed evidence demonstrates that KMART timely produced all income and expense figures in its possession, historic and actual, for the real property. (Emphasis in original).

While KMART here contends that the tax court's Anoka County decision turned on legal interpretation of the statutory language, when this case was argued in the Tax

Court, KMART admitted that Anoka County had been decided in KMART's favor: "[B]ecause Anoka County failed to rebut KMART's affidavits showing that it had no real estate operating expense or income information beyond what was produced...." As the Tax Court found, in the instant case, Stearns County had made a compelling factual record that the expenses sought here were (a) clearly available to the taxpayer and (b) plainly the kind of property related expense information customarily relied upon in the appraisal process. The judge presiding over the Anoka County case was persuaded by evidence presented in that case to make an unavailability finding while the judge presiding over the Stearns County case was persuaded not to make the unavailability finding.

B. Minnesota's 60-day Rule Does Not Violate Constitutional Void-for-Vagueness Principles as Written or as Applied.

KMART here relies upon three criminal cases in support of its contention that Minnesota's tax collection statute is facially void for vagueness. Connally v. General Construction Co, 269 U.S. 385 (1926) holds that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Connally involved the attempt to prosecute a contractor for a criminal violation of an Oklahoma prevailing-wage statute although the contractor could not determine the prevailing wage.

Grayned v. City of Rockford, also relied upon by KMART, involved the conviction of a demonstrator for "willfully making a noise or diversion that disturbs or tends to

disturb the peace." In holding that the statute was not unconstitutionally vague, the Court held that statutes imposing criminal penalties for exercising First Amendment Freedoms must not inhibit the exercise of those freedoms. 408 U.S. 104, 108-109 (1972).

Petitioner also cites Kolender v. Lawson, 461 U.S. 352 (1983) which struck down a California statute allowing the arrest and conviction of any person who loiters or wanders on the streets but cannot provide a "credible and reliable" identification and who could not account for their presence when requested by a police officer. The statute had both First Amendment and Fourth Amendment implications for this Court.

KMART supplies no case which suggests that the process of judicial interpretation of tax collection statutes is subject to the Constitutional void-for-vagueness doctrine. But there is no occasion here to consider whether a civil statute could ever be found void for vagueness, for the statute in question is so crystal clear. The statute plainly requires production of property related expenses. KMART plainly had property related expenses in its possession. KMART conceded in the Tax Court that the statute clearly applied, provided only that the County proved that relevant expenses not produced were actually in KMART's possession, and the Tax Court so found.

C. Kmart Wrongly Relies upon the McKesson and Reich Line of Decisions.

In a series of decisions, this Court has held that a state taxpayer is entitled to utilize traditional state court remedies to

collect a refund of a tax which violates the United States Constitution or other federally protected right. McKesson Corp v. Division of Alcoholic Beverage and Tobacco, 496 U.S. 18 (1990); Reich v. Collins, 513 U.S. 106 (1994); Newsweek, Inc. v. Florida Dept of Revenue, 522 U.S. 442 (1998); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). A state court may not frustrate a state taxpayer's right to relief from an unconstitutional taxation statute by eviscerating the state's procedural remedies in a way which has been designed to eliminate the right to refund.

In McKesson, wholesale liquor distributors filed suit, challenging a Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida-grown citrus crops and then bottled in Florida. After the tax was found to violate the Commerce Clause, the Florida Supreme Court refused to provide a refund or any other form of post-payment relief. This Court held that the Due Process Clause requires a state to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

Reich v. Collins, supra, dealt with an attempt by Georgia to avoid paying refunds to federal employees after this Court had previously ruled that a state could not exempt state retirement benefits from taxation if the state imposes an income tax upon federal retirement benefits. In Reich v. Collins, this Court held that Georgia could not frustrate attempts to recover the unconstitutionally collected tax by retracting what plainly appeared to be the only clear and certain post-deprivation remedy. The decision in Reich prevents state tax collectors from jiggering state procedures to

deprive a taxpayer of a remedy to enforce his federally protected rights.

In Newsweek, Inc. v. Florida Dept of Revenue, supra, Newsweek sought a refund of sales taxes following a determination that the exemption available for newspapers, but not magazines, was unconstitutional under the First Amendment. Following the determination, the Florida Supreme Court retroactively reversed its own longstanding precedent on how a taxpayer could obtain a refund effectively depriving Newsweek of any method to obtain a refund. Again, this Court acted to protect a taxpayer's right to obtain effective relief following a judgment vindicating a federally protected right.

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 281 U.S. 673 (1930), also cited by KMART, Savings Company invoked federal constitutional protection with a contention that a township assessor had intentionally and systematically discriminated against Savings Company's shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent, or less, of their value.[5]

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[5] In some sense, every tax assessment could be framed as raising constitutional issues on the theory that taxpayers are entitled to equal treatment. But if a state provides a remedy to challenge unequal assessment, the allegation of unequal assessment alone does not raise a federal question. Cf. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

The Missouri Supreme Court dismissed Savings Company's challenge by inexplicably reversing its own long-standing authoritative holding in the LaClede case on how a taxpayer perfects a tax appeal. As this Court wrote:

> Under the settled law of the state, that [LaClede] remedy was the only one available. .....after the decision in the LaClede case, it would have been entirely futile for the plaintiff to apply to the commission. That body had persistently refused to entertain such applications; and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the LaClede case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent.

The Brinkerhoff Court was very careful to recognize that State Courts are free to change their interpretation of law or procedure without constitutional consequence. The Missouri

Supreme Court decision represented a perfect-storm of constitutional invasions:

> ....the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; ... this court's power to review decisions of state courts is limited to their decisions on federal questions, and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.

The Brinkerhoff decision thus plainly and directly rejects KMART's contention here. Constitutional considerations are raised under the Brinkerhoff decision only if the highest court of the State has previously ruled authoritatively on the proper method to seek review, and then seeks retroactively to change that decision in a way that denies the taxpayer any remedy:

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.

Case-by-case interpretation of the law is inherent in our common law system of jurisprudence. One central feature of the common-law system is that the prevailing party is afforded the fruits of the favorable decision of the court. If the

prevailing party merely established rules of precedent applicable to future litigants, our common law system would be reduced to litigation by advisory opinion in which litigants had no concrete stake in the outcome, and in which no party would have standing to advocate its views on interpretation of the law. Affording the fruits of victory to the prevailing party is a fundamental tenant of our judicial system.

IV. CONCLUSION

KMART has not raised a substantial federal question. At the time it failed to file property related expense information, both statute and Supreme Court precedent plainly stated that expense information must be filed. KMART chose to withhold that information and dismissal resulted from routine application of a clearly written statute.

July 14, 2006

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